

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

)
 Amendment of the Commission's
 Rules to Establish New Personal
 Communications Services)

GEN Docket No. 90-314

RM-7140, RM-7175, RM-7618

OPPOSITION TO PETITIONS FOR RECONSIDERATION

CELLULAR INFORMATION SYSTEMS, INC., Debtor in Possession ("CIS"), pursuant to Section 1.429(f) of the Commission's Rules, hereby opposes certain petitions for reconsideration of the Commission's Second Report and Order (the "Order") in GEN Docket 90-314, which established the broadband personal communications services ("PCS").^{1/} In particular, CIS opposes allowing cellular carriers affiliated with either the local exchange carrier ("LEC") or Regional Bell Operating Company ("RBOC") to further their dominance of the cellular market within their landline franchise areas by obtaining more than 10 MHz of PCS spectrum.

I. Introduction

CIS is an independent cellular system operator that has been an active system owner and operator since 1987. Through its wholly-owned subsidiaries CIS operates multiple cellular systems in several states, including a cluster of Block A systems in Wisconsin and stand-alone systems on both Block A

^{1/} See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, GEN Docket No. 90-314 (adopted Sept. 23, 1993).

and Block B in Texas, Arkansas and Alabama.

CIS believes that the Order is an admirable decision that balances many competing interests in a reasonable manner. The licensing of PCS is a necessary step to establishing a viable wireless competitor to the local exchange monopolist. Indeed, CIS believes that ample reasons to limit LEC-affiliated PCS within the LEC franchise area were demonstrated in the record. Additionally, although CIS questions the Commission's belief that more competition to cellular providers is necessary, CIS accepts the inevitability of increased competition from PCS providers and requests only that the Commission ensure that PCS systems are not used to further anticompetitive goals. Indeed, it is precisely because the Commission believes that PCS should become a competitor to cellular that it should consider the possible effects on independent cellular operators of removing the cellular eligibility limits on LEC- and RBOC-affiliated cellular carriers within their affiliated landline franchise areas.

The Commission should not lose sight of the fact that many small, independent cellular carriers exist. Clearly, the cellular industry is dominated by McCaw and the RBOCs, but these companies do not control all long-term service providers. PCS provides a new opportunity for dominant cellular carriers to exclude independent carriers from regional and national service arrangements. The Commission should ensure the continuing viability of independent carriers by making plain that a dominant cellular carrier's eligibility to hold PCS licenses is

conditioned on the restraint of the dominant carrier and its affiliates from acting in an anticompetitive manner with respect to smaller cellular system operators.

II. The FCC Should Prevent the Anticompetitive Use of PCS Licenses and Ensure the Continued Viability of Independent Cellular System Operators.

Section 99.204 of the Commission's Rules as adopted in the Order limits the eligibility of cellular carriers to 10 MHz of PCS spectrum in PCS markets in which they have a cognizable interest in cellular systems serving 10 percent or more of the population.^{2/} Under this rule, RBOC- and LEC-affiliated cellular carriers, for the most part, will only be eligible for 10 MHz allocations within their landline monopoly franchise areas. There are exceptions to this general rule, however, that should be addressed. Additionally, any reconsideration of the Order that would allow RBOC- and LEC-affiliated cellular carriers to acquire even greater amounts of spectrum within their landline franchise areas could have adverse effects on the viability of cellular operators like CIS. To ensure fair competition between PCS and cellular carriers, the Commission should emphasize the need for the dominant RBOC- and LEC-affiliated cellular carriers to cooperate with independent cellular carriers and to refrain from anticompetitive exclusionary tactics.

There are a limited number of Block B cellular systems owned by

^{2/} See also Order at ¶ 105.

non-LEC affiliated entities. By and large, these systems depend upon carrier-to-carrier agreements with the RBOC- and LEC-affiliated systems in the surrounding markets. For example, CIS owns three stand-alone Block B systems, in the Laredo, Texas MSA, in the Pine Bluff, Arkansas MSA and in the Florence, Alabama MSA. Each of these systems is virtually surrounded by systems controlled by one LEC or RBOC.^{3/} CIS's Block B systems participate in many of the nation- and region-wide services provided by Block B cellular systems. The viability of independent Block B systems depends upon the ability of the independent carrier to participate in these service offerings.

Until the Commission allocated radio spectrum for PCS, LEC and RBOC-affiliated cellular carriers had no long-term interest in preventing independents from participating in regional Block B service offerings. Even though dependent on the good offices of its dominant neighbors, systems such as CIS's Block B systems could enter regional arrangements on a nearly equal footing because their systems were necessary links in the regional systems developed by the RBOC- and LEC-affiliated carriers on Block B. Now, however,

^{3/} The Laredo MSA is adjacent to Mexico and the Texas 18 and Texas 19 RSAs. Southwestern Bell controls the Block B systems in the two Texas RSAs. The Pine Bluff MSA is adjacent to the Little Rock MSA, the Arkansas 5, Arkansas 6, Arkansas 10 and Arkansas 12 RSAs. Limited partnerships controlled by ALLTEL Corporation hold the licenses for the Block B cellular systems in all but the Arkansas 12 RSA. The Florence MSA is adjacent to the Mississippi 2 RSA, Tennessee 5 RSA, the Huntsville, Alabama MSA and the Alabama 1 RSA. BellSouth Corporation controls or manages almost all of the Block B systems adjacent to CIS's Florence system.

if the Commission liberalizes cellular eligibility for RBOC- and LEC-affiliated cellular systems, the dominant cellular carriers will attempt to dictate the terms on which independent cellular carriers may participate in the regional Block B service offerings or will replace the independent systems with LEC- and RBOC-affiliated PCS systems.^{4/} With the advent of dual-mode cellular/PCS phones, the RBOCs, whose past practices should be well-known to the Commission, would then have the motive and means to bring their PCS systems into their cellular Block B regional systems to the detriment of independent carriers.

For example, Southwestern Bell could not obtain either of the licenses for the San Antonio, Texas MTA, but would be eligible for one of the 10 MHz PCS systems in the Laredo, Texas BTA.^{5/} Assuming that the Commission adopts and strictly enforces effective limits on the definition of a Designated Entity and the transferability of PCS Blocks C and D, Southwestern

^{4/} CIS opposes liberalizing cellular eligibility for PCS licenses for LEC- and RBOC-affiliated cellular carriers only because they have sufficient market power in all telecommunications services to be able to eliminate independent cellular carriers. CIS believes that the limit on cellular eligibility should not be imposed where the carrier is not affiliated with the LEC and, in particular, intends to combine PCS and cellular systems in order to compete with the landline monopoly.

^{5/} Because of its dominant position within the San Antonio MTA, Southwestern Bell would not be eligible for more than 10 MHz of spectrum on an MTA basis and, therefore, could not acquire either PCS Block A or Block B. The four counties that make up the Laredo BTA include three counties that are not in the Laredo MSA, yet the one county in the Laredo MSA contains approximately 87% of the population in the Laredo BTA. Southwestern Bell could acquire a 10 MHz PCS license for the Laredo BTA.

Bell still could acquire PCS Blocks E, F or G in the Laredo BTA.^{6/} While a 10 MHz system might have enough capacity to be an effective replacement for CIS's Laredo system in the region-wide cellular service offerings available in the south Texas area, a 20 MHz PCS system almost certainly would. The Commission should not adopt the positions of NYNEX and BellSouth in their petitions for reconsideration.^{7/} Liberalizing PCS eligibility for RBOC- and LEC-affiliated cellular carriers within their affiliated landline franchise area would allow Southwestern Bell to acquire a 20 MHz system in the Laredo BTA and, then, in conjunction with its regional landline and cellular dominance, to dictate its terms to CIS or exclude CIS altogether from the cellular Block B service offerings in the region.

Even under the current rules, however, there may be areas for which the LEC- and RBOC-affiliated cellular carrier could be eligible for up to

^{6/} CIS is assuming a "best-case" scenario in which the Commission adopts the Designated Entity set-aside for PCS Blocks C and D. In any event, unless the Commission also adopts strict rules in the competitive bidding rule making against allowing LEC- and RBOC-affiliates within their landline franchise area to manage and operate the PCS systems of Designated Entities, companies like Southwestern Bell could simply circumvent any limit on their eligibility and integrate managed PCS systems into their regional landline and cellular operations.

^{7/} Petition for Reconsideration filed by NYNEX Corporation at 13, GEN Docket No. 90-314 (filed on Dec. 8, 1993); Petition for Reconsideration filed by BellSouth Corporation at 14, GEN Docket No. 90-314 (filed on Dec. 8, 1993).

40 MHz of PCS spectrum within their affiliated landline franchise.^{8/} In these areas there is great potential for anticompetitive exclusionary conduct that should not be allowed by the Commission. If the Commission is serious about establishing PCS as a competitor to cellular, then the Commission should make sure that the PCS allocations are not used by dominant cellular carriers to eliminate independent cellular operators. The Commission should not allow RBOC- and LEC-affiliated cellular carriers to acquire more than 10 MHz of additional spectrum within their affiliated landline franchise areas. In order for PCS to become a full-fledged competitor to the landline monopoly, the Commission should not allow the LECs and RBOCs to expand their current monopolies.

Even if the petitions are denied, the pronounced potential for exclusionary conduct exists. The Commission should ensure that PCS licenses are only used to increase fair competition among wireless service providers and not used to cut out independent cellular systems from region-wide services. The Commission could increase the likelihood of future cooperation over exclusion by

^{8/} For example, in the Laredo BTA a highly anomalous result would occur if there were a slight increase in the population of Laredo, Texas so that the one county in the Laredo MSA would have more than 90% of the population of the Laredo BTA. In that event, even though Southwestern Bell would control the cellular Block B systems in three of the four counties in the Laredo BTA, Southwestern Bell would be eligible for the full 40 MHz of PCS spectrum in the Laredo BTA. This potential result should be prohibited by limiting RBOC- and LEC-affiliated cellular systems to 10 MHz of PCS spectrum within their affiliated landline franchise area.

incorporating into its reconsideration order a clear statement that makes the following points:

There is no restriction on the integration of PCS systems with other telecommunications systems except as follows:

- If a PCS system is integrated with cellular systems, then the cellular licensee shall be obligated to maintain existing relationships with other cellular licensees on the same Frequency Block in a reasonable manner and shall be obligated to negotiate in good faith with other cellular carriers on the same Frequency Block regarding the establishment of new cellular services;
- Cellular carriers may obtain only 10 MHz of PCS spectrum within the cellular market unless the integrated systems will compete with the landline monopoly; and
- LEC and RBOC cellular affiliates may obtain only 10 MHz of PCS spectrum within their affiliated LEC or RBOC landline franchise area.

Even though the obligations of good faith and reasonability are not without ambiguity, a short statement of policy along these lines could prevent future exclusionary conduct simply because the Commission takes the time to emphasize the importance of fair play.

III. Conclusion

For the foregoing reasons, CIS opposes the petitions for reconsideration of the Order to the extent that adoption would allow LEC- and RBOC-affiliated cellular carriers to acquire more than 10 MHz of PCS spectrum within their affiliated landline franchise area. CIS also submits that the

Commission should clearly state in the reconsideration order that, as a condition to obtaining and holding any PCS license covering a commonly controlled landline franchise area, it will impose stringent obligations on RBOC- and LEC-affiliated cellular carriers to avoid anticompetitive exclusionary conduct and to deal in good faith with other cellular licensees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carole Walsh, hereby certify that today on this 30th day of December, 1993, I caused a copy of the OPPOSITION TO PETITIONS FOR RECONSIDERATION of CELLULAR INFORMATION SERVICES, INC., Debtor in Possession to be served by first-class mail, postage prepaid to the following:

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